IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JASON MASHORE	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFREY A. BEARD	:	No. 02-6837

MEMORANDUM AND ORDER

McLaughlin, J. February 24, 2004

The petitioner was convicted by a jury in the Court of Common Pleas of Philadelphia on February 26, 1998, of robbery, theft, possession of an instrument of crime, and criminal conspiracy. His co-defendant was acquitted. The Superior Court of Pennsylvania affirmed the petitioner's conviction on November 6, 2000. The petitioner has filed the present habeas petition, alleging that the trial judge violated his constitutional rights by having an ex parte discussion with the jury during their deliberations, about statements given to the police by the petitioner and his co-defendant.

The Honorable Diane M. Welsh has filed a Report and Recommendation ("R&R") that the petition be denied and a certificate of appealability not issue. The petitioner filed objections to the R&R and the Court held oral argument on February 19, 2004. The Court agrees with the recommendation of

Judge Welsh that the petition be denied. But the Court will issue a certificate of appealability.

The Court incorporates the background section of the R&R into this memorandum. In summary, the petitioner was tried with a co-defendant for the robbery of a tire store. After his arrest, the petitioner admitted going into the tire store to commit robbery but said that he "got scared" and withdrew from participating in the robbery with the co-defendant. The co-defendant also gave a statement admitting his involvement in the robbery and implicating the petitioner.

The trial court ordered that both defendants' statements be redacted to delete any reference to the other defendant. The petitioner does not dispute that the statements were properly redacted and the jury properly instructed initially under Bruton v. United States, 391 U.S. 123 (1968). The petitioner's claims arise from interaction between the trial judge and the jury during deliberations.

After the jury began deliberating, the trial judge conferred with the parties' counsel regarding questions from the jury as to the time of the robbery and the time of the petitioner's arrest. Upon agreement of all counsel as to the appropriate response to the jurors' questions, the judge entered the deliberation room without counsel and instructed the jurors that they should use their own recollection to make

determinations of fact. The petitioner's counsel did consent to the judge communicating with the jurors in the deliberation room on that particular issue without counsel present. While the judge was in the deliberation room, the foreperson asked if it would be permissible for the jury to see an exhibit to help the jurors answer their questions regarding the time of the robbery and the time of the petitioner's arrest. The judge left the deliberation room and again conferred with the parties' counsel and counsel again agreed upon an acceptable response for the jury.

After the judge went into the deliberation room with the court reporter and provided the agreed upon response for the jury, the following communication occurred between the judge and the jury:

> JUROR NO. 9: A trial like this when there are two defendants, is it possible for one to say the name of the other or visa versa?
>
> JUROR NO. 6: On the statement is it possible they can mention the other, you know what I mean, defendant's name and state if they confessed to a crime?
>
> THE COURT: I cannot answer that.
>
> JUROR NO. 2: Is that part of the law?
>
> THE COURT: Yes.

It is this particular communication between the judge and jury and the judge's alleged failure to notify the petitioner of the

communication which petitioner presently claims violated his constitutional rights.

While the judge was still in the deliberation room, jurors asked the judge about the definition of "Possession of an Instrument of Crime." The record indicates that the judge left the deliberation room and conferred with the lawyers again, and the judge subsequently re-entered the deliberation room. The judge then told the jury: "I have just had discussions with all three lawyers, I explained to them the question that you asked in the room as the court reporter was taking it down, and I indicated I would re-read the definition of Possession of an Instrument of Crime, and that was agreed by all the lawyers." The judge re-read the requested definition.

The petitioner raised three issues in the Superior Court, only one of which relates to the claims raised in his habeas petition. The Superior Court considered whether "the trial court err[ed] when the court answered questions posed by the jury regarding [the petitioner's] statement, and implicating the principles of Bruton v. United States, without first informing the parties that the questions had been asked, in violation of [the petitioner's] state and federal constitutionally guaranteed rights to counsel, due process of law, confrontation and cross-examination, and to be present during the proceedings against him." Commonwealth v. Mashore,

No. 1599 Philadelphia 1998, slip op. at 2 (Pa. Super.Ct. Nov. 6, 2000).

Although the Superior Court does not say so explicitly, it appears that the Superior Court either found or assumed error because it performed a harmless error analysis under the following rubric: '"where there has been ex parte contact between the court and jury in a criminal case, we are constrained to reverse the defendant's conviction unless there is no reasonable possibility that the error might have contributed to the conviction."' Id. at 7-8, quoting Commonwealth v. Young, 748 A.2d 166, 175 (1999). This analysis is comparable to the analysis for constitutional error set out by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967): "'[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'"

The petitioner claims that the Superior Court erred by not presuming prejudice by the petitioner's absence at a critical stage of the proceedings against him, citing United States v. Cronic, 446 U.S. 648 (1984). The petitioner also argues that even if prejudice should not have been presumed, the Superior Court unreasonably applied the Chapman analysis. The respondent argued before the Magistrate Judge that the petitioner's claims were procedurally defaulted. Judge Welsh recommended that the

Court reject this argument. At oral argument before this Court, the respondent appears to argue that only the claim that prejudice should be presumed is defaulted because the petitioner did not specifically cite Cronic to the Superior Court. The Court is not persuaded by this argument; the obligation to exhaust state remedies does not include the obligation to name a specific Supreme Court case on which the petitioner ultimately relies. The Court adopts the analysis of Judge Welsh on the issue of exhaustion of state remedies.

The Court, therefore, will consider the merits of the petition.[1] The Court incorporates herein the legal standard under 28 U.S.C. § 2254 set out by the Magistrate Judge. See R&R at 5-8. The petitioner argues that the Pennsylvania courts unreasonably applied clearly established United States Supreme

[1] The respondent made the threshold argument that the Court should assume (1) that the trial judge told all counsel about the colloquy the judge had had with the jurors with respect to the statements and (2) that defense counsel did not object to the judge's response. There is no basis in the record to make that assumption or conclusion. Counsel for the respondent argued that it was the petitioner's burden to show otherwise and that he had not met his burden. The petitioner's counsel stated that the petitioner's counsel had represented during the appellate process in the state courts that trial counsel learned of the judge's colloquy with the jurors only after the notes of testimony had been transcribed for the appeal. The Superior Court assumed for purposes of the appeal that the trial judge had not told counsel the questions that the jury had about the statements because the trial judge's discussions with trial counsel were not recorded. This Court will also assume, because there is not evidence to the contrary, that the judge did not inform counsel of the judge's colloquy with the jurors about the statements.

Court precedent within the meaning of 28 U.S.C. § 2254(d) in its analysis of the error committed by the trial judge and in its harmless error analysis.

As stated above, the Court reads the Superior Court decision as finding error at least in the ex parte nature of the conversation among the trial judge and the jurors. The Superior Court does appear to have rejected the argument that the trial judge's responses to the jurors' questions violated Bruton. The Court agrees with the Superior Court that the trial judge erred in answering the jurors' questions ex parte but also concludes that the trial judge's colloquy with the jurors and its failure either to tell defense counsel of the colloquy or to reinstruct the jury on the proper use of the statements was error.

The questions from the two jurors exhibited confusion over how the jury was to use the defendants' statements. It does appear that at least some of the jurors were going beyond what the trial court had originally instructed on the use to be made of the statements under Bruton. The jurors appeared to be considering each defendant's statement in relation to the other defendant. Rather than saying, "I cannot answer that," the trial judge should have consulted with counsel about the question and then reinstructed on Bruton, making clear that the jury should not make any inferences about what was redacted from the statements. The court's non-response did not reaffirm what the

court had stated earlier, as argued by the respondent. The Court concludes that it was error.

Concluding that there was constitutional error is just the first step in the analysis, however. The next question is does the petitioner have to show prejudice from the error or should prejudice be presumed. The petitioner argues that prejudice must be presumed because this error is structural under Cronic. The Court is not persuaded by the petitioner's arguments.

Prejudice is not presumed every time a Court has an ex parte discussion with a deliberating jury. See United States v. Toliver, 330 F.3d 607, 617 (3d Cir. 2003). In Toliver, the Court of Appeals found constitutional error in a trial judge's answering a jury's question without counsel's presence or permission; but, the Court, nevertheless, conducted a harmless error analysis. It is true that the trial judge's interaction with the jury in Toliver was arguably less prejudicial than what happened here. In Toliver, the trial judge, after receiving a note from the jury requesting certain testimony, had certain portions of the testimony transcribed and sent back to the jury without consulting with counsel. Here, the jurors expressed confusion over how they were allowed to use the defendants' statements – a situation calling for a re-instruction by the Court or at least consultation with counsel as to the proper way

to respond to the jurors' questions. The Court's analysis, however, is also informed by United States v. Richards, 241 F.3d 335 (3d Cir. 2001), in which the Court of Appeals conducted a harmless error analysis of a Bruton violation. When this Court puts Toliver and Richards together, it concludes that even if this were a direct appeal of a federal court conviction, prejudice should not be presumed.

If prejudice would not be presumed in a direct appeal, it should not be presumed in a habeas case. The question in a habeas case is whether the Pennsylvania courts' decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. The Court cannot conclude that it was. The Court does not read Cronic to say that every time a judge talks ex parte with the jury, prejudice will be presumed. Here, the trial judge erred not in what the judge said but in what the judge did not say and do: inform the lawyers of the questions and reinstruct on Bruton.

Having concluded that prejudice should not be presumed, the next question is whether or not the Superior Court's analysis of the harmless error issue resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. When a state court finds error but finds that the error was harmless, a question is raised as to

whether the state court's application of Chapman should be reviewed or whether the federal court should independently apply the harmless error standard for habeas cases set forth in Brecht v. Abrahamson, 507 U.S. 619, 622 (1993) ("The standard for determining whether habeas relief must be granted is whether the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict.'"). See Penry v. Johnson, 532 U.S. 782, 795 (2001) (applying Brecht in habeas case post AEDPA). The Third Circuit has not decided this issue. Marshall v. Hendricks, 307 F.3d 36, 73 n. 25 (3d Cir. 2002).

The Court does not have to decide this issue here because it finds that the error would be harmless under either standard. The co-defendant presented a misidentification defense at trial, emphasizing the several failures of eyewitnesses to identify him in photo arrays and lineups. During the trial, the co-defendant contended that his statement to the police, in which he admitted that he robbed the store with the petitioner, was involuntary. To support this argument, the co-defendant elicited testimony that the police placed him, shirtless and wet, in an air-conditioned room for several hours. The jury acquitted the co-defendant.

The Court agrees with the respondent that the most reasonable conclusion from the acquittal is that the jury believed that the statement was coerced. It, therefore, is

highly unlikely that the jury used the discredited statement against the petitioner. This is especially true in light of the strong evidence against the petitioner. The victim identified the petitioner several times as the man standing at the door with a shotgun and another employee of the store identified the petitioner as one of the two men at the scene. The petitioner admitted in his statement that he entered the store, armed with a gun, intending to rob it. His defense was that he changed his mind. In light of all of the evidence and the jury's acquittal of the co-defendant, the Court finds no error in the Superior Court's harmless error analysis. The Court's conclusion is the same under the Brecht standard.

Although the Court denies the habeas petition, it will issue a certificate of appealability ("COA"). The Supreme Court recently has cautioned that the habeas court should not deny a COA merely because it believes that the petitioner will not succeed on appeal. Miller-El v. Cockrell, 537, U.S. 322, 337 (2003). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 338. The question whether the petitioner has met this standard is a close one for the Court; but the Court will issue the COA. I cannot say that the petitioner's interpretation of Cronic is not debatable.

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ORDER

AND NOW, this 24th day of February, 2004, upon consideration of the petitioner's Petition for Writ of Habeas Corpus, the respondents' Answer to the Petition, and the Report and Recommendation ("R&R") of United States Magistrate Judge Diane M. Welsh, the petitioner's Objections thereto, the respondents' response thereto, and oral argument on the petitioner's Objections held on February 19, 2004, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is DENIED and DISMISSED without an evidentiary hearing; and a certificate of appealability is GRANTED for the reasons stated in a memorandum of today's date.

BY THE COURT:

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MARY A. MCLAUGHLIN, J.